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No. 81-455
IN THE

Supreme Court of the United States

October Term, 1981

GRACE BRETHREN CHURCH, *et al.*,

Cross-Appellants,

vs.

UNITED STATES OF AMERICA, *et al.*,

Cross-Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO DISMISS OR AFFIRM OF CROSS-APPELLEES STATE OF CALIFORNIA, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, AND THE DIRECTOR OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT.

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Counterstatement of Questions Presented.

1. Where the cross-appellants disagree with portions of the District Court's opinion below, is a cross-appeal properly taken from the judgment therein which afforded all of the relief the cross-appellants sought?

2. Whether a violation of the Free Exercise Clause results from the inclusion of employees of religious schools in the unemployment compensation program.

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MOTION TO DISMISS OR AFFIRM OF CROSS-APPELLEES STATE OF CALIFORNIA, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, AND THE DIRECTOR OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT.

Cross-appellees State of California, California Employment Development Department and The Director of the California Employment Development Department (hereinafter collectively referred to as "the State") respectfully move to dismiss the cross-appeal herein, or in the alternative, affirm the judgment of the District Court insofar as that judgment is challenged by this cross-appeal.

Constitutional Provisions and Statutes Involved.

The constitutional and statutory provisions involved are correctly set forth in the Cross-Jurisdictional Statement.

Counterstatement of the Case.

Cross-appellants initiated this action challenging and seeking to enjoin the imposition, upon the schools operated by the cross-appellants, of unemployment taxes under the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. § 3301, *et seq.* and the corresponding state law, California Unemployment Insurance Code. Cross-appellants contended that services performed at their schools were not subject to unemployment taxation on purely statutory grounds. In the alternative, cross-appellants argued that to impose unemployment insurance coverage upon them would be violative of their rights protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

The District Court granted all of the relief sought by the cross-appellants, enjoining the collection of unemployment information and tax from all of the churches and schools which are cross-appellants herein. (*See*, Appendix F at 87a-90a.)[1]

Specifically, the District Court found as to some of the schools operated by the cross-appellants that they were exempted from the unemployment compensation tax program by the plain meaning of the statutes in issue herein. (Appendix F at 88a-89a.) As to the remainder of the schools operated by the cross-appellants, the District Court concluded that said schools were not exempted by virtue of the plain meaning of the statutes, but nevertheless held that to apply the statutes to them would result in entanglement between Church and state forbidden by the First Amendment to the United States Constitution. (Appendix F at 87a-89a.)

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[1]The reference herein to Appendices is to The Appendices to the Jurisdictional Statement filed by appellants United States of America, *et al.* in Case No. 81-228 and the pagination thereof.

The Order and Judgment of the District Court makes no reference to the absence of a violation of the Free Exercise Clause by the imposition of the unemployment tax. (Appendix F.) Rather, the District Court's Second Supplemental Opinion includes a discussion of the issue and a rejection of the arguments put forth herein by the cross-appellants. (Appendix E at 56a-66a.) It is this portion of the opinion from which the instant cross-appeal is actually taken.

ARGUMENT.

I.

Cross-Appellants Are Not Aggrieved by the Judgment Below and Therefore May Not Appeal From It.

There are two standing requirements a party must satisfy in order to be entitled to appeal from an order or judgment. First, the appellant must be privy to the record. Second, the appellant must be aggrieved by the order or judgment appealed therefrom. 9 Moore's FEDERAL PRACTICE, ¶ 203.06 (2d ed. 1980). It is the second requirement which is absent herein.

A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it. *Deposit Guaranty Nat. Bank v. Roper* (1980) 445 U.S. 326, 333; *United States Parole Comm'n. v. Geraghty* (1980) 445 U.S. 388, 402; *Perez v. Ledesma* (1971) 401 U.S. 82, 87 n. 3; *Public Service Comm'n. v. Brashear Freight Lines, Inc.* (1939) 306 U.S. 204, 206; *Lindheimer v. Illinois Telephone Co.* (1934) 292 U.S. 151, 176; *New York Telephone Co. v. Maltbie* (1934) 291 U.S. 645; *Corning v. Troy Iron & Nail Factory* (1854) 15 How. 451, 464. Moreover, a party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree. *Lindheimer v. Illinois Telephone Co., supra,* 292 U.S. 151, 176; *Electrical Fittings Corp. v. Thomas & Betts Co.* (1939) 307 U.S. 241, 242. Appeals are to be taken from portions of a court's *order* which a litigant seeks to change, *not* from parts of an *opinion* with which the litigant disagrees. *See,* Robert L. Stern, *When To Cross-Appeal Or Cross-Petition — Certainty Or Confusion?* (1974) 87 Harv.L.Rev. 763, 774.

In the present case, there is nothing in the judgment below relating to Free Exercise Clause violations which aggrieves the cross-appellants. The cross-appellants obtained the precise injunctive relief they sought. Nothing more was requested nor could be obtained. That which the cross-appellants seek to change is *not* portions of the District Court's judgment, but rather parts of the opinion. As the above authorities indicate, such is not proper grounds for an appeal. Therefore, the cross-appeal must be dismissed.

II.

No Violation of the Free Exercise Clause Results From the Inclusion of Employees of Religious Schools in the Unemployment Compensation Tax Program.

Cross-appellants contend that the District Court erred in finding that the inclusion of employees of religious schools in the unemployment compensation tax program results in no violation of the Free Exercise Clause. The State respectfully disagrees with the cross-appellants. The law and the facts of this case plainly support the District Court's findings. None of the arguments put forth herein by the cross-appellants are new. They were fully considered and properly rejected by the District Court in a well reasoned opinion. (Appendix E at 56a-66a.)

In considering cross-appellants' arguments below, the District Court correctly observed that the injury to the Free Exercise rights asserted by the cross-appellants ultimately comes down to the *financial* burden imposed by the extension of the unemployment compensation tax to these schools. (*See*, Appendix E at 60a-61a, 65a-66a.) Indeed, cross-appellants' chief witness, the superintendent of Redwood Christian Schools (one of the cross-appellants), testified below that a very important reason his school is op-

posed to the imposition of the unemployment compensation tax is the *financial* aspect of the program. (R.T., pp. 43-45.)[2] Consistent therewith, the superintendent also testified that with respect to minimum wage and worker's compensation laws his school would *not* comply with those laws if the *cost of compliance* rose to a point *above* that which would be acceptable to the school. (R.T., pp. 40-42; 70-73.) Further, the testimony of another cross-appellant, a parent of students attending Redwood Christian Schools, indicated that her opposition to the imposition of the unemployment compensation tax was *financially* related in that her tuition would have to increase in the event the program was extended to cover Redwood. (R.T., p. 115.)

In all, the evidence presented below plainly demonstrated that the burden or injury complained of by the cross-appellants was purely financial in nature.[3] As the District Court correctly noted "there [was] no suggestion that the extension of the tax to religious schools would abridge rights to the free exercise of religion in any fashion *independent* of the financial burden which accompanies any tax." (Appendix E at p. 60a.) This Court has noted previously that the mere fact that a statute renders the practice of religion

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[2]"R.T." refers to Reporter's Transcript of proceedings before Hon. Mariana R. Pfaelzer on August 12-13, 1980.

[3]The District Court correctly pointed out (Appendix E at 62a-63a) that the "burden" the unemployment compensation's tax imposes upon a non-profit employer such as cross-appellants is *indirect* in that the employer may elect the "reimbursement method" of contribution and thus contribute only the amounts of benefits actually found due to its former employees who have been or are discharged. *See*, 26 U.S.C. §§ 3303(e), 3309(a)(2) and California Unemployment Insurance Code § 801, *et seq*. In the alternative, the employer may choose the "tax rate" method and contribute according to the number of employees and his past employment history. *See*, 26 U.S.C. § 3302(a)(1) and California Unemployment Insurance Code §§ 901, *et seq*. and 976, *et seq*. Clearly, the opportunity to select either method of contribution minimizes the financial impact upon the employer.

more expensive is not, by itself, sufficient to bring the statute into conflict with the Free Exercise Clause. *Braunfeld v. Brown* (1961) 366 U.S. 599, 605; *Johnson v. Robison* (1974) 415 U.S. 361, 383-385 (argument rejected that the withholding of educational benefits from a conscientious objector violated the free exercise rights of the objector). There is no constitutional right to exemption from taxes for the cross-appellants. *Follett v. McCormick* (1944) 321 U.S. 573, 578; *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 112.

Moreover, it is without dispute that religiously based activities "are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers." *Wisconsin v. Yoder* (1972) 406 U.S. 205, 220, *See, Gillette v. United States* (1971) 401 U.S. 437 (conscientious objector exemption statute upheld); *Braunfeld v. Brown, supra,* 366 U.S. 599 (mandatory Sunday closing law applicable to Orthodox Jewish merchants); *Prince v. Massachusetts* (1944) 321 U.S. 158 (child labor law applicable to religious organizations); *Reynolds v. United States* (1879) 98 U.S. 145 (polygamy statutes applicable to religious organizations which sanctioned such activities).

Neutral legislation which is far more burdensome upon the practice of religion than that which is present in the instant case has been upheld by this Court where important public policies are at stake. *Committee For Public Education And Religious Liberty v. Regan* (1980) 444 U.S. 646, 659-661; *Prince v. Massachusetts, supra,* 321 U.S. 158.

Furthermore, cross-appellants argue that excessive entanglement results from the routine duty under the unemployment compensation tax program to keep accurate em-

ployment records and make related reports to the State. This argument must be rejected in that the recordkeeping involved herein is far less extensive than that which was recently sustained against similar charges in *Committee For Public Education And Religious Liberty v. Regan, supra,* 444 U.S. 646, 659-661.

Finally, the District Court correctly pointed out that there is indeed a compelling secular governmental interest in providing unemployment compensation to unemployed individuals. (Appendix E at 64a-65a.) *See,* California Unemployment Insurance Code § 100, which lists the secular purposes for which California adopted its own unemployment compensation program. Further, this Court has recognized the extreme importance of unemployment benefits. *California Department of Human Resources v. Java* (1971) 402 U.S. 121, 131-2. ("Unemployment benefits provide cash to a newly unemployed worker, 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels . . ."). When this compelling interest is balanced against the indirect, purely financial burden which the unemployment compensation tax program imposes upon the cross-appellants, the conclusion is inescapable that no violation of the Free Exercise Clause results from the inclusion of the employees of religious schools in the unemployment compensation tax program.

Conclusion.

For the reasons stated herein, the cross-appeal should be dismissed or in the alternative the judgment insofar as it is being challenged by the cross-appeal should be affirmed.

Respectfully submitted,

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